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NO. 08-1124

Supreme Court, U.S.
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In The Supreme Court Of The United States

REBECCA L MARCHAND, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ALFRED G. MARCHAND, DECEASED,

Petitioner,

v.

JOSHUA MARCHAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION OF THE PETITION FOR WRIT OF CERTIORARI

The Petitioner, by and through her attorney hereby files her Reply to the Brief in Opposition of the Petition for the Writ of Certiorari.

INTRODUCTION

This case is about a matter of national importance. The Brief in Opposition filed by the Respondent categorically ignores the events of September 11th, 2001 and the legislative response to these events by the Congress and President of the United States of America.

Our country faced a unique national tragedy; a terrorist attack of unprecedented violence upon unsuspecting, entirely innocent civilians.

As a result of these events, the September 11th Victim Compensation Fund was created as a part of the Air Transportation Safety and System Stabilization Act of 2001. Pub. L. 107-42, 115 Stat 230 (2001). The Homeland Security Act was enacted. The President authorized military action in Iraq and Afganistan. To deny that there events were a national federal response is to deny the significance of September 11th and the lessons we have learned, in dealing with its aftermath. There can be no question that his case raises important questions of federal law in its own right and for future situations involving mass injury.

ARGUMENT

POINT 1.

THE PURPOSE OF THE SEPTEMBER 11TH VICTIM'S COMPENSATION IS TO COMPENSATE THE DEPENDENTS OF A DECEASED VICTIM

The September 11th Victim Compensation Fund of 2001, Title IV of Public Law 107-42, 115 Stat 230, 67 Federal Reg. 11,234 (March 13, 2002) 28 C.F.R. 104, was intended to compensate the victims of this atrocity, or their dependent survivors. If a "victim" was killed, then those who were deprived of the economic benefit of the victim were to be compensated. ("victim" defined at 28 C.F.R § 104.3 (e), 66 C.F.R. 66282 as amended at 67 C.F.R. 11246, March 13, 2002). All of Special Master's regulations and decisions were implemented to determine an award to compensate those dependents who were deprived of the economic benefit of the deceased victims. The purpose of the Fund was to make certain as much as possible that those persons who relied on the income of the victim received the Fund benefits.

In this case, the facts are clear. Alfred G. Marchand died when the aircraft where he was working as a flight alter crashed into the World Trade Center. Alfred Marchand left a surviving spouse, and a stepson, both of whom were determined to be dependents by decision of the Special Master. Alfred Marchand also left an adult son, Joshua Marchand, who was not a dependent. The New Mexico Supreme Court decided that the adult non-dependent son should receive the entire

economic award and the full award made to the Marchand probate estate. The non-dependent adult son received excessive compensation. He had no economic loss resulting from the death, yet he received $569,971.88. The dependent minor child received zero economic loss. The New Mexico Supreme Court erred.

The absurdity of the decision by the New Mexico Supreme Court can be more clearly understood if the facts were changed slightly. Suppose, hypothetically, that the victim was a 44 year old female flight attendant who was survived by her dependent spouse and his dependent minor stepson. Her dependent spouse is a disabled cancer stricken former veteran, who won the Medal of Honor. Her dependent stepson is a normal high school freshman. She is also survived by her natural adult son from a former marriage who is a multi-millionaire trust fund recipient. According to the precedent created by the New Mexico Supreme Court, the multi-millionaire son would receive all of the economic award from the Fund while the cancer patient dependent surviving spouse and stepson would receive nothing. Such a result is not what was intended by the United States Congress when it provided funds for victims. The only way to protect victim's rights under special federal legislation, the September 11th Victim Compensation Fund, is for the Supreme Court of the United States to provide the precedent and the guidelines in support of this historic legislation.

POINT II.

THE ROLE OF THE SPECIAL MASTER

The case presents a unique opportunity to comprehend and clarify the role of a federally authorized Special Master empowered to distribute funds to compensate victims of the national tragedy of September 11th. See *Schneider v. Feinberg,* 345 F.3d 135 (2d Cir. 2003). The Special Master has the authority by the federal regulations, ". . . to provide adequate guidance to a court of competent jurisdiction". 28 C.F.R. §104.33(g), 66 C.F.R. 66282 as amended at 67 C.F.R 11246, March 13, 2002.

The powers and the authority of the Special Master of the September 11th Victim's Compensation Fund was presented and considered by the New Mexico Courts,. The trial Court, which is the State District Court, stated that:

> 2. The Court finds that there is no genuine issue of material fact that the "final award" arising out of this claim upon the September 11th Victims Compensation Fund is $769,971.88.
> 3. The Court finds that the "collateral offsets" deducted from the total damages by the Special Master to arrive at the "final award" are not subject to review or re-allocation by this Court except that the Court holds that it is consistent with the apparent Congressional intent that they be offset against general economic damages.

4. The Court finds that the $100,000, non-economic damage award to the surviving spouse, Rebecca L. Marchand, is a part of the "final award" and was awarded "as directed by the Special Master" and is not subject to review or re-allocation by this Court.

5. The Court finds that the $100,000, non-economic damaged award to the dependent child Trae Hale is a part of the "final award" and was awarded "as directed by the Special Master" and is not subject to review or re-allocation by this Court.

6. The Court holds that the remaining amount of the "final award" ($769,971.88 -$450,000 = $319,971.88) was awarded by the Special Master as economic damages which are community property under Section 45-2-102, NMSA, and pass to the surviving spouse.

7. The Court holds that the $250,000, general non-economic damage award is a part of the "final award" which was not allocated "as directed by the Special Master" among the claimants and it is separate property of the Decedent. Under Section 45-2-102, NMSA, Plaintiff, surviving child, is entitled to ¾ of this amount ($187,500) and Defendant surviving spouse is entitled to ¼ ($62,500) of this amount.

(Brief in Chief Appendix, p. 44, paragraphs 3-7. Summary Judgment by the District Court, pps. A-43 through A-46).

The State District Court (trial court) awarded the surviving spouse, Rebecca Marchand, all of the economic damages. This is the same result contemplated by the Special Master. It is uncontradicted in the record that the New Mexico District Court is a Court of Competent jurisdiction.

The New Mexico Court of Appeals also addressed the role of the Special Master. The New Mexico Court of Appeals stated:

> {26} With regard to Joshua's contentions, he misconstrues the Special Master's directions that compensation for economic loss is to be generally distributed according to the wrongful death laws of the decedent's domicile and misinterprets the law. First, as stated above, our wrongful death law directs that the economic loss award be split between Rebecca and Joshua. Second, with regard to Joshua's contention that the collateral offsets were improperly applied in this case, we note that Congress bestowed great discretion on the Special Master to determine appropriate offsets, and we cannot say that based on its directives, the Special Master erred in this case. See, e.g., 28 C.F.R. § 104.47(a) (providing that when determining the appropriate collateral

> offsets the Special Master may employ an appropriate methodology).

(Brief, p. A-37, paragraph 26, *Marchand v. Marchand*, 142 N.M. 795, 171 P.3d 309 (Ct. App. 2007)).

The New Mexico Court of Appeals considered the Special Masters directions and found that the Special Master did not err in this case by awarding the surviving spouse one-half of the economic damages. The New Mexico Court of Appeals is a Court of Competent jurisdiction.

The New Mexico Supreme Court also addressed the role of the Special Master in several places in its opinion in *Marchand v. Marchand*. 2008 NMSC-065, 199 P.3d 28, (N.M. 2008). In particular, the New Mexico Supreme Court stated: "Under these circumstances, the Special Master's directive embodies a basic notion of fairness". (Petitioners Brief, Appendix A-15). The New Mexico Supreme Court then proceeds to reinterpret the decision of the Special Master, while ignoring completely the Final Report of the Special Master. (United States Department of Justice, Kenneth R. Feinberg, Esq. "Final Report for the September 11th Victims Compensation Fund of 2001, Vol. I, November 18, 2004).

Because the Final Report had been discussed during oral argument before the Court, it was reproduced in substantial portion in the Motion for Rehearing. The Supreme Court of New Mexico was aware of the Final Report of the Special Master. Questions addressed to the Petitioner during oral

argument asked for interpretations of matters contained in the Final Report. I have no explanation for the short-term memory loss of counsel for the Respondent who argues that the Final Report was never considered by the New Mexico Courts. Nevertheless, the Final Report of Kenneth Feinberg, Esq., the Special Master of the September 11th Victims Compensation Fund was completely ignored by the New Mexico Supreme Court in its published opinion. The failure to respect the guidance given by the Final Report of the Special Master for its policy and precedential value is creating bad law.

The Special Master is absolutely clear that he authorized distributions to the surviving spouse from the Fund in an amount of at least one-half of the economic loss award in every one of the more than 2800 cases decided by his office. See *Final Report*, p.57. There can be little doubt that the Special Master had the Congressional authority under the Act and the Federal Regulation's to do so. (Air Stabilization Act § 405 (b), 49 U.S.C.A. 40101). He even had the general authority to provide adequate guidance for a court of competent jurisdiction §104.33. The Special Master's determination is final and not subject to judicial review, See Air Stabilization Act § 405 (b) (3), 49 U.S.C.A. 40101.

The New Mexico Supreme Court apparently decided that "its interpretation" of the Special Master's rulings and policy would override the Special Master's own interpretation of his precedent and his "basic notice of fairness", embodied in the Final Report of the Special Master.

The proper approach to the issue of collateral offsets, as confirmed by the Final Report, could have been to award the entire amount of the economic loss to the surviving spouse. This approach is consistent with the concepts underlying the September 11th Victims Compensation Fund which are to compensate those who were deprived of the economic benefit of the victims. The point was to make certain that the persons who relied on the income of the victim received the benefits. These are his dependents; the surviving spouse, Rebecca Marchand and his stepson. Instead, the New Mexico Supreme Court took the non-economic awards off the top and then divided the remainder as economic loss. As a result, the non-dependent adult son, Joshua Marchand received excessive compensation because he had suffered no economic loss resulting from the death of the victim. That the adult non-dependent child received the entire economic loss is completely contradicted by the policy statement and summary of awards made by the Special Master and set out in the Final Report.

Even the New Mexico Supreme Court recognizes that ". . . the Act and accompanying regulations do not expressly require that an individual share of the fund award must be reduced by the amount of collateral benefits that individual received". Petitioners Brief, Appendix A-13, *Marchand v. Marchand* 2008 NMSC-065, paragraph 24. However, the New Mexico Supreme Court then goes on to reduce the dependents share based upon a decision in a workman's compensation case. *Strickland v. Roosevelt County Rural Electric Corp,* 103 N.M. 63, 702 P.2d 1008 (Ct. App. 1984). The *Strickland* case holds that there should be no "double

recovery" when collateral offsets are considered in the context of a workmen's compensation claim. There is no double recovery here. The economic award to the surviving spouse, Rebecca Marchand is just enough to make her whole by compensating her for the deprivation of the economic benefit of the victim; her husband, Alfred G. Marchand. The law of workman's compensation has no application and no value as precedent in a case involving the September 11th Victim Compensation Fund. The New Mexico Supreme Court erred. All of the other victim compensation fund cases were heard and decided by the Special Master. It is the Special Master's rules and policy about "fairness" when determining compensation which could reach the level of "res judicata". The Special Master has advised that Rebecca Marchand is entitled to some or all of the economic loss compensation of the award. It is the congressional intent underlying the September 11th Victims Compensation Fund made clear by the Final Report of the Special Master which are in need of support by this Court.

POINT III.

CHEVRON DEFERENCE

It is no small matter that the Final Report of the Special Master should be given deference. According to the Act, the decisions of the Special Master are final and not subject to judicial review, Air Stabilization Act § 405 (b)(1) 49 U.S.C.A. 40101. Furthermore, the administrative law decisions entered by the Special Master are proper and should be given deference for their precedential value or "to provide adequate guidance" to our courts. The

decisions of the Special Master are summarized in his Final Report, and the reasons supporting his decisions are explained in the Final Report.

To ignore the pronouncements, logic and reasoning of the Special Master contained in his Final Report, while stating that, "The Special Master's directive (Final Report) embodies all basic notion of fairness" almost defies comment. There are available for review the September 11th Fund Regulations, Claim Forms, and the Final Report which make it evident that the Special Master had the authority to determine how the compensation award was made in every case, and to set the policy and precedent that no surviving spouse should receive less than one-half of the Fund award.

The Final Report of the Special Master must be given deference. See *Chevron USA v. Natural Resources Defense Counsel*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed. 2d 694 (1984); see also *Schneider v. Feinberg*, 345 F.3d 135 (2d Cir. 2003). Otherwise, there can be no explanation why the Final Report was required by Congress, or why the experience, wisdom, and dedication of the Special Master will be without judicial significance.

CONCLUSION

I respectfully request that the Supreme Court of the United States act in partnership with the Special Master on the September 11th Victims Compensation Fund, Kenneth Feinberg. Esq., to provide equal justice to all surviving spouses and dependents of the victims of the September 11th tragedy.

Our system of justice must be able to know in advance what to do when we have to deal with a public compensation scheme that not only provides financial relief for the victims but also expresses a shared national grief in response to a terrible national tragedy.

Congress gave the Special Master the lawful authority to compensate the surviving spouse of deceased victims. This court has the power to confirm the precedent stated by the Special Master in his Final Report and achieve the result he envisioned in this case, which is to award the surviving spouse and dependent child their fair share of the economic loss award. This Court can confirm the Summary Judgment of New Mexico District Court which awarded Rebecca Marchand all of the economic loss. This Court can confirm the award of the New Mexico Court of Appeals which awarded the surviving spouse one-half of the economic loss. The Court should reverse the New Mexico Supreme Court award of zero economic loss to the victim's dependents, Rebecca Marchand and Trae Hale. The September 11th Victim Compensation Fund was created to compensate those who were deprived of the economic benefit of the victim. In this case they are the surviving spouse, Rebecca Marchand and her son.

For the foregoing reasons, the Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

_____

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